

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RYNEARSON, III

Plaintiff,

v.

ROBERT FERGUSON, Attorney General of
the State of Washington,

and

TINA R. ROBINSON, Prosecuting Attorney
for Kitsap County,

Defendants.

NO. 2:17-cv-1042

COMPLAINT FOR INJUNCTIVE RELIEF
AGAINST ENFORCEMENT OF
WASHINGTON'S CYBERSTALKING
STATUTE, SECTION 9.61.260(1)(b)

INTRODUCTION

1. Plaintiff routinely engages in constitutionally protected—if provocative—online speech and resides in Kitsap County, Washington.

2. Plaintiff seeks to contest, on First and Fourteenth Amendment grounds, the constitutionality of a Washington statute which purports to criminalize constitutionally protected political and other expression on the internet. Revised Code of Washington § 9.61.260(1)(b) (“the statute”), provides in relevant part:

(1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:

1 (b) Anonymously or repeatedly whether or not conversation occurs.

2 3. Plaintiff sues to contest the constitutionality only of the prohibition against
3 “anonymous[] or repeated[] speech” to third parties with the requisite intent. Plaintiff is not here
4 challenging the prohibition against “lewd, lascivious, indecent, or obscene” speech, RCW §
5 9.61.260(1)(a), and does not object to the prohibition against speech “[t]hreatening to inflict
6 injury on ... person or property,” *id.* § 9.61.260(1)(c). The statute was expressly made severable
7 by the Washington Legislature. Laws of 2004, ch. 94, § 6.

8 **PARTIES**

9 4. Plaintiff Richard Lee Rynearson, III is a natural person, at all relevant times
10 residing in Bainbridge Island, Kitsap County, Washington. Mr. Rynearson is an activist who
11 maintained a blog for seven years and regularly publishes comments and articles on various
12 Facebook pages.

13 5. Defendant Robert Ferguson is, and at all times relevant was, the Attorney General
14 of Washington, and is, pursuant to Revised Code of Washington § 43.10.030, the chief law
15 enforcement officer of the State of Washington, charged with representing the state in civil and
16 criminal matters. He is sued here in his official capacity for purposes of obtaining equitable
17 relief.

18 6. Defendant Tina R. Robinson is, and at all times relevant was, the Prosecuting
19 Attorney in and for Kitsap County, Washington, empowered and authorized, pursuant to Revised
20 Code of Washington § 36.27.020, to investigate and to prosecute felony crimes referred by
21 county law enforcement agencies and city law enforcement agencies, and gross misdemeanor
22 and misdemeanor crimes referred by county law enforcement agencies. She is also authorized to
23 prosecute gross misdemeanor and misdemeanor crimes referred by the City of Bainbridge island,
24 which has contracted with the Kitsap County Prosecutor’s Office for prosecution services. She is
25 sued here in her official capacity for purposes of obtaining equitable relief.

26 7. The Defendants, and each of them, at all times herein were and are authorized and
27 empowered to enforce the statute contested herein under color and authority of state law.

1 such as Governor Jay Inslee and former President Barack Obama, that voted for or signed the
2 NDAA of 2012. Plaintiff's posts often include invective, ridicule, and harsh condemnation (but
3 no profanity or obscenity) intended to criticize or call into question the actions and motives of
4 these civic leaders and other public figures.

5 12. Plaintiff has a well-founded fear and faces a credible threat of criminal
6 prosecution under Section 9.61.260(1)(b) for this online speech. Specifically, the Bainbridge
7 Island Police Department found probable cause for a cyberstalking charge against Plaintiff based
8 on online speech to and about one of the subjects of Plaintiff's criticism, the founder of the
9 Bainbridge Island Japanese-American Exclusion Memorial (Clarence Moriwaki). Mr. Moriwaki
10 is a speaker and activist who has written columns for the Seattle Times, and has generally been
11 active publicly around a variety of issues, including the internment of Japanese-Americans, and
12 the lessons of the internment for modern times.

13 13. Defendant Robinson has not filed charges based on this speech, but has not
14 officially declined to file charges, either. Defendant Robinson's office conveyed the impression
15 to Plaintiff that the office will revisit its decision on whether to prosecute Plaintiff in part based
16 on Plaintiff's future speech. Specifically, Defendant Robinson's office conveyed a veiled threat
17 of prosecution which Plaintiff could avoid by refraining from political commentary directed at
18 the previous subject of Plaintiff's criticism.

19 14. In addition to the public figure at issue in the Bainbridge Island Police
20 Department report, Plaintiff has condemned and sharply criticized other public figures and
21 government officials in the past in online posts and commentary. Under Defendants'
22 interpretation of Section 9.61.260(1)(b), these posts could also be deemed to be written with the
23 purpose of tormenting, harassing, or embarrassing the criticized figures and officials. Plaintiff
24 intends to engage in substantially similar online speech in the future. Plaintiff reasonably fears
25 that these online posts or similar future posts will expose him to prosecution under Section
26 9.61.260(1)(b). For that reason, he has self-censored his posts and been subjectively chilled as to
27 the content of his online speech.

1 15. Plaintiff wishes to engage in constitutionally protected speech, including speech
 2 on matters of public concern, without fear of criminal prosecution under Section 9.61.260(1)(b),
 3 even though that expression might be considered harassing or embarrassing to the subjects about
 4 whom he writes. Plaintiff does not here contest paragraph 9.61.260(1)(a), which prohibits lewd,
 5 lascivious, and obscene speech, and does not object to paragraph 9.61.260(1)(c), which prohibits
 6 certain threatening speech. Plaintiff also does not contest that portion of Section 9.61.260(1) that
 7 prohibits online speech to a person, as opposed to speech about a person to a “third party.”

8 16. Pursuant to Revised Code of Washington § 9.61.260(2), (3), violation of the
 9 statute is a gross misdemeanor, except when certain aggravating factors are present, in which
 10 case it is a Class C felony. In Washington, gross misdemeanors are punishable by incarceration
 11 of up to 364 days and a fine of up to five thousand dollars (\$5,000.00). RCW § 9A.20.021(2).
 12 Class C felonies are punishable by up to five years in prison and a fine of up to ten thousand
 13 dollars (\$10,000).

14 **COUNT – FACIAL UNCONSTITUTIONALITY**

15 17. Plaintiff restates as if fully rewritten here each and every averment set forth in
 16 Paragraphs 1 through 16 of this Complaint, above.

17 18. On its face, Section 9.61.260(1)(b) criminalizes expression based upon the
 18 content of the expression in question, notwithstanding that the government generally “has no
 19 power to restrict expression because of its message, its ideas, its subject matter or its content.”
 20 *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

21 19. On its face, Section 9.61.260(1)(b) criminalizes expression based upon the
 22 purpose of the expression in question, making it an offense to publish material online
 23 “[a]nonymously or repeatedly” with “intent to harass, intimidate, torment, or embarrass any
 24 other person.” Restrictions which define regulated speech by its function or purpose are content
 25 based. Under Section 9.61.260(1)(b), any online expression published with the purpose of
 26 tormenting, intimidating, harassing, or embarrassing another person is proscribed and subject to
 27 prosecution if done repeatedly or anonymously, making the restriction content based.

20. On its face, Section 9.61.260(1)(b) is not limited to defamation, obscenity, threats, or other forms of expression that may be lawfully curtailed or punished consistent with the First Amendment. Indeed, obscenity and threats are plainly encompassed within other paragraphs of the statute ((1)(a) and (1)(c)), making plain that Section 9.61.260(1)(b) is intended to criminalize speech that is non-threatening and not obscene.

21. On its face, Section 9.61.260(1)(b) is not limited to harassing speech directed to an unwilling listener, like traditional telephone harassment laws. Rather, Section 9.61.260(1)(b) expressly criminalizes speech to “third part[ies]” as well as speech to “such other person” and thereby criminalizes speech about an unwilling subject. Attempts to block from public dissemination the flow of information regarding an unwilling subject violates the First Amendment. *Organization for a Better Austin v. Keefe*, 403 U.S. 415, 420 (1971).

22. The terms “harass, intimidate, torment, or embarrass” are not defined by the statute. The Washington Supreme Court, in a case examining the similarly-worded telephone-harassment statute, has defined “intimidate” to include “compel[ling] to action or inaction (as by threats),” *Seattle v. Huff*, 767 P.2d 572, 576 (Wash. 1989), but it did not provide a definition for the other proscribed purposes. When statutory terms are undefined, however, Washington courts generally give them their ordinary meaning, including the dictionary definition. *See id.* (defining “intimidate” by reference to definition in Webster’s Third New International Dictionary). The dictionary definition of “harass” includes “to vex, trouble, or annoy continually or chronically,” Webster’s Third New International Dictionary, Unabridged (online ed. 2017), and the meaning of “torment” includes “to cause worry or vexation to,” *id.* Finally, “embarrass” means “to cause to experience a state of self-conscious distress.” *Id.*

23. As a result, even public criticisms of public figures and public officials could be subject to criminal prosecution and punishment if they are seen as intended to persistently “vex” or “annoy” those public figures, or make them “self-conscious” about something.

24. As a content-based restriction on speech, Section 9.61.260(1)(b) is “presumptively unconstitutional” unless it both furthers a compelling governmental interest and

1 is narrowly tailored to do so. *Reed*, 135 S. Ct. at 2226-27. Section 9.61.260(1)(b) serves no
 2 compelling governmental interest, nor is it narrowly tailored to serve any legitimate state
 3 interest. Section 9.61.260(1)(b) restricts substantially more protected speech than is necessary to
 4 serve any legitimate governmental interest, much less any compelling governmental interest.

5 25. Plaintiff has been both subjectively and reasonably chilled in the exercise of his
 6 right to engage in speech, including speech on matters of public concern, under the First
 7 Amendment to the United States Constitution, in that he has refrained, and unless Section
 8 9.61.260(1)(b) is declared unconstitutional and its enforcement is enjoined, will continue to
 9 refrain from publishing certain commentary online for fear of prosecution.

10 PRAYER

11 WHEREFORE, having stated his claim against the Defendants, Plaintiff hereby demands
 12 judgment against the Defendants, and each of them, as follows:

13 A. A declaration that Section 9.61.260(1)(b) is unconstitutionally overbroad, in
 14 violation of the First Amendment to the United States Constitution, as made applicable to the
 15 states through the Fourteenth Amendment;

16 B. A preliminary injunction and permanent injunction enjoining the Defendants, and
 17 each of them, and all those acting for, with or in active concert with them, after notice of such
 18 injunction, from enforcing Section 9.61.260(1)(b);

19 C. An award of attorney fees and costs of suit pursuant to 42 U.S.C § 1988 and Local
 20 Civil Rule 54(d); and

21 D. Such other relief, be it legal or equitable, that the Court in the sound exercise of
 22 its discretion, deems just.

23 DATED: July 11, 2017.

Respectfully submitted,

24 SCOTT & CYAN BANISTER FIRST
 25 AMENDMENT CLINIC

26 UCLA SCHOOL OF LAW

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